Chung May Yen v Puncakdana Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–1604 OF 2001
AZMEL J
20 SEPTEMBER 2002

Contract *— Breach — Delay — Delay in delivery of vacant possession — Delay in securing approvals for water supply, electricity supply and sewerage treatment plant and piping — Whether defendant's failure to fulfil term in agreement caused by circumstances beyond defendant's control — Whether plaintiff entitled to terminate agreement*

Contract *— Waiver — What constitutes waiver — Delay in delivering vacant possession of property — Plaintiff issued termination notice seven months after expiry of completion date — Whether plaintiff had waived rights to terminate agreement*

The plaintiff entered into an agreement ('SPA') with the defendant to purchase a piece of property in Kuala Kubu Bahru. Section 6.04 of the SPA stipulated that delivery of vacant possession of the property would be made within 36 months from the date of the SPA ('the completion date'). The plaintiff had paid a sum of RM52,801 towards the purchase price. No subsequent payment was made as the defendant did not request for the same. The defendant failed to deliver vacant possession of the property to the plaintiff on the completion date. The plaintiff gave notice of termination of the SPA some seven months after the completion date. This action was commenced by the plaintiff one year after notice of termination was given by the plaintiff. In disputing the plaintiff's claim, the defendant argued that it had not committed any breach of the SPA because there was a delay in securing approvals for water supply, electricity supply and sewerage treatment plant and piping. The other ground relied on by the defendant was the issue of waiver. According to the defendant, the plaintiff had waived her rights to terminate the SPA as she did not issue the notice of termination immediately after the expiry of the completion date. The defendant also relied on s 9.03 of the SPA, which provided that the defendant shall not be liable to the plaintiff for any failure to fulfil any term in the SPA if the same was caused by circumstances beyond the defendant's control. This was the plaintiff's application to seek answers to the questions of whether: (a) the plaintiff was entitled to terminate the SPA; (b) the defendant was obliged to refund all monies paid by the plaintiff to the defendant; and (c) in the answers to (a) and (b), the defendant was obliged to pay interest on the amount to be refunded to the plaintiff.

Held, allowing the plaintiff's action:

(1) Contrary to the defendant's argument, the approval for the water supply was given expeditiously by the relevant department. As for electricity supply, the defendant had only paid the requisite connection costs to Tenaga Nasional Bhd after the expiry of the

completion date. The delay in getting the approval for the sewerage treatment plant and piping was caused by the defendant as its submission was not made in conformity with the planning approval of the relevant authority. In any case, even if it were true that the completion of the project was delayed by reason of the events stated in s 9.03 of the SPA, it would be incumbent on the defendant to apply to the Housing and Development Department ('HDD') for an extension of time to complete the project and on legitimate reasons, the HDD would allow an extension of time for the defendant to complete the project. Here, there was no evidence that an application had been made to the HDD (see p 220A–I).

(2) The plaintiff had evinced an intention to terminate the SPA by sending a letter to the defendant seven months after the expiry of the completion date. By the time the plaintiff filed this action, reasonable time had already been given to the defendant to effect delivery of vacant possession of the said property but the defendant failed to do so. It would be most unfair and unjust to allow the defendant to complete the works eternally. The defendant was guilty of inordinate delay without giving any valid reason (see pp 221F–G, I–222A).

[Bahasa Malaysia summary

Plaintif mengikat satu perjanjian ('PJB') dengan defendan untuk membeli sebidang hartanah di Kuala Kubu Bahru. Seksyen 6.04 PJB menetapkan bahawa hantar-serah milikan kosong hartanah tersebut akan dibuat dalam tempoh 36 bulan dari tarikh PJB ('tarikh penyelesaian'). Plaintif telah membayar jumlah sebanyak RM52,801 terhadap harga belian. Tiada bayaran seterusnya dibuat kerana defendan tidak meminta yang sama. Defendan gagal menghantarserah milikan kosong hartanah tersebut kepada plaintif pada tarikh penyelesaian. Plaintif memberi notis pemberhentian PJB kira-kira tujuh bulan selepas tarikh penyelesaian. Tindakan ini dimulakan oleh plaintif setahun selepas notis pemberhentian diberikan oleh plaintif. Dalam mempertikaikan tuntutan plaintif, defendan berhujah bahawa ia tidak melakukan apa-apa kemungkiran PJB kerana berlakunya kelewatan plaintiff dalam mendapatkan kelulusan untuk bekalan air, elektrik dan loji penapisan pembetung dan paip. Alasan lain yang dikemukakan oleh defendan adalah isu penepian. Menurut defendan, plantif telah mengenepikan haknya untuk menamatkan PJB kerana beliau tidak mengeluarkan notis penamatan dengan segera selepas luputnya tarikh penyelesaian. Defendan juga bergantung pada s 9.03 PJB, yang memperuntuk bahawa defendan tidak bertanggungjawab kepada plaintif atas apa-apa kegagalan untuk memenuhi mana-mana terma dalam PJB sekiranya yang sama disebabkan oleh keadaan di luar kawalan defendan. Ini merupakan permohonan plaintif untuk mendapatkan

jawapan kepada soalan-soalan tentang sama ada: (a) plaintif berhak menamatkan PJB; (b) defendan wajib mengembalikan semua wang yang dibayar oleh plaintif kepada defendan; dan (c) dalam jawapan kepada (a) dan (b), defendan wajib membayar faedah atas amaun yang harus dikembalikan kepada plaintif.

Diputuskan, membenarkan tindakan plaintif:

(1) Bertentangan dengan hujah defendan, kelulusan untuk bekalan air diberikan secepat mungkin oleh jabatan berkenaan. Berhubung dengan bekalan elektrik, defendan hanya membayar kos sambungan yang perlu kepada Tenaga Nasional Bhd selepas luputnya tarikh penyelesaian. Kelewatan dalam memperolehi loji penapisan pembetung dan paip disebabkan oleh defendan kerana permohonannya tidak dibuat selaras dengan kelulusan perancangan pihak berkuasa berkenaan. Walau bagaimanapun, jikapun benar bahawa penyelesaian projek ditangguh akibat sebab-sebab yang dinyatakan dalam s 9.03 PJB, defendan wajib memohon kepada Jabatan Perumahan dan Pembangunan ('JPP') untuk perlanjutan masa untuk menyiapkan projek dan atas alasan yang sah, JPP tentu akan membenarkan perlanjutan masa untuk defendan menyelesaikan projek tersebut. Di sini, tiada keterangan bahawa satu permohonan telah dibuat kepada JPP (lihat ms 220A–I).

(2) Plaintif telah menunjukkan hasrat menamatkan PJB dengan menghantar surat kepada defendan tujuh bulan selepas luputnya tarikh penyelesaian. Apabila plaintif memfailkan tindakan ini, tempoh yang munasabah telah diberi kepada defendan untuk melaksanakan hantar-serah milikan kosong hartanah tersebut tetapi defendan gagal berbuat demikian. Adalah tidak adil untuk membenarkan defendan menyelesaikan kerja-kerja selama-lamanya. Defendan bersalah atas kelewatan terlampau tanpa memberi alasan yang sah (lihat ms 221F–G, I–222A).]

Notes

For cases on delay, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2150–2162.

For cases on what constitutes waiver, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 4169.

Cases referred to

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65 (distd)

Joseph Yeo (*Joseph Yeo*) for the defendant.

Azmel J: By way of an originating summons, the plaintiff made an application seeking answers to the following questions:

A (1) whether the plaintiff is entitled to terminate the sale and purchase agreement in respect of property under Lot No KKBP1–24, D'Tinggian Nusa, Kuala Kubu Bahru, Selangor entered between the plaintiff and the defendant;

(2) whether the defendant is obliged to refund all monies paid by the plaintiff to the defendant; and

B

(3) if the answers to (a) and (b) are in the affirmative, whether the defendant is obliged to pay interest on the amount to be refunded to the plaintiff.

The brief facts of the case are as follows. On 24 October 1996, the plaintiff C entered into sale and purchase agreement with the defendant in respect of the purchase of a property known as Lot No KKBP1–24 Kuala Kubu Bahru, Selangor ('the said property'). Section 6.04 of the said agreement stipulates that delivery of vacant possession of the said property to the plaintiff would be made within 36 months of the signing of the said agreement, that is on or before 23 October 1999.

D Payments in respect of the said property were to be made progressively in accordance with the third schedule of the said agreement. At the request for payment by the defendant, the plaintiff had so far paid a sum of RM52,801.95 being the amount for the first five progress payments. No subsequent progress payment were requested by the defendant. On E 23 October 1999, the defendant failed to deliver vacant possession of the said property to the plaintiff. On 25 May 2000, the plaintiff gave notice of termination of the said agreement to the defendant. But the defendant refused to accept the termination of the agreement by the plaintiff. Almost a year later, on 15 May 2001 the plaintiff commenced this action in court against the defendant.

F The main issue to be determined in this case is whether the plaintiff had lawfully terminated the said agreement. In disputing the plaintiff's claim, the defendant raised the following defences. Firstly, the defendant argued that it had not committed any breach of the said agreement. The defendant claimed that the delay in delivering vacant possession was due to the delay G on the part of the relevant authorities approving the following:

(1) delay in securing approval for water supply;

(2) delay in approval of electricity supply; and

(3) delay in securing approval for sewerage treatment plant and piping.

H The defendant invoked s 9.03 of the said agreement, which states:

> Circumstances beyond the vendor's control
>
> Notwithstanding any provisions hereinafter contained to the contrary (if any) it is hereby expressly agreed by the parties hereto that the vendor shall not be liable to the purchaser for any failure on its part to fulfil any term of this I agreement if such fulfillment is delayed, hindered or prevented by circumstances beyond the control of the vendor including but not limited to force majeure, acts of God, civil commotion, acts of war, strike or combination workmen, lockout riot, inclement weather, loss or damage by

fire, flood or tempest, delay or refusal by the authority to grant any necessary sunction or approval or in completing their work in the said Lot other circumstances of whatever nature beyond the control of the vendor. A

On this ground of defence, the plaintiff contended that it was not true at all that the relevant authorities had caused any delay in giving their respective approvals. The plaintiff contended that in the case of the approval from Jabatan Bekalan Air, Hulu Selangor, the defendant's application was made on 31 March 1997 and the approval was given on 7 May 1997. As such, the approval was quite expeditiously granted. Based on the above facts, I do agree that there was no delay in giving the approval by Jabatan Bekalan Air. B

In respect of the approval for electricity supply by Tenaga Nasional Bhd ('TNB'), the plaintiff alleged that the delay in obtaining the electricity supply was not the fault of TNB but solely due to the defendant's failure and/or refusal to get the land ready for electricity supply works. In her written submission, the plaintiff contended that the defendant's letter dated 17 September 1999 clearly showed that the defendant and/or its agent's had applied for electricity supply, and the related reticulation works, to be carried out in April or May 2000. By a letter dated as late as 25 May 2001, the defendant admitted to only making payment of the requisite 'kos sambungan' on 17 April 2000. This is way past the date of delivery of vacant possession of the said property. The chronology of events clearly indicated that notification of readiness of the defendant's project for electricity supply works and request for contribution amount (kos sambungan) was only made as late as 17 September 1999. From the above scenario, I was quite satisfied that the delay was caused by the defendant's failure to have the said project ready for electricity supply works. The delay was not caused by TNB. C D E

In respect of the defendant's allegation of delay in getting the approval of the sewerage treatment plant plan by Jabatan Perkhidmatan Pembentungan Kuala Lumpur ('JPP'), it was also contended by the plaintiff that the blame should also fall on the defendant and not on the JPP. The plaintiff explained that the defendant's consultants had submitted its plans for sewerage treatment plant five times before approval was obtained on 18 May 2001. The approval had been previously rejected because the application was not in conformity with the earlier planning approval by JPP dated 20 June 1997. I was therefore quite satisfied that the delay in obtaining the approval was due to the defendant's own faults and no blame should be made against the JPP. F G

I also wish to point out that if it is true that the said project was delayed by reason of the occurrence of any event as mentioned in s 9.03 of the said agreement it would be incumbent upon the defendant to apply for extension of time to complete the said project to the Housing Development Department. On legitimate reasons, the said department would allow an extension of time to the defendant to complete the project. In this case, I was unable to see any evidence adduced indicating that such extension of time had been applied for and granted by the said Department. In the absence of such extension of time being granted, it must be assumed that H I

A the date of the delivery of vacant possession of the said property remained the same, that is 23 October 1999.

The second ground relied upon by the defendant was the issue of waiver. The defendant contended that because the plaintiff did not issue notice of termination immediately after the date for the delivery of vacant possession of the said property, the plaintiff had therefore waived her rights to terminate and as such time would no longer become the essence of the contract. In support of such contention, the defendant relied on the Court of Appeal case of *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, where NH Chan JCA said at pp 73–74:

> When time is no longer of the essence of the contract and ... no time for performance is specified, s 47 of the Contracts Act 1950 allowed the promise to be performed within a reasonable time. If there has been unnecessary delay by the party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end.

The plaintiff disputed the defendant's contention that the plaintiff had waived her right to terminate. However, even assuming that she had waived her rights the defendant had not done anything between the time she gave notice of termination to the time she filed this action in court.

The date of delivery of vacant possession was 23 October 1999. The plaintiff issued notice of termination to the defendant on 25 May 2000. The defendant disputed the notice and said that the plaintiff had no right to terminate the said agreement. Subsequently on 15 May 2001, the plaintiff filed this action in court. Up to this date, the defendant had not completed the works on the said project and had not given any notice to the plaintiff giving delivery of vacant possession of the said property.

The question that is required to be determined is whether the defendant is entitled to the defence of waiver in this case. It was contended by the plaintiff that she had evinced her intention to terminate the said agreement by sending the letter dated 25 May 2000 to the defendant and even though the defendant refused to accept the plaintiff's termination of the said agreement it had knowledge that the plaintiff would take steps to terminate the said agreement. Hence, when the plaintiff filed this action on 15 May 2002, reasonable time had been given to the defendant to effect delivery of vacant possession of the said property but the defendant failed to do so.

In this particular case, the plaintiff had issued notice to terminate on 15 May 2000 when contractually the delivery of vacant possession should be on 23 October 1999. The defendant disputed the plaintiff's rights to terminate the said agreement. Subsequently the plaintiff filed this action on 15 May 2000. From the time notice of termination was issued to the time the plaintiff filed this action in court, the defendant still could not deliver vacant possession of the said project to the plaintiff. In my view, even though no specific time for delivery had been stated by plaintiff to ask the defendant to deliver vacant possession, the period of almost one year was more than sufficient to be given to the defendant to deliver vacant possession. The period of one year is equivalent to one-third of the total contract period for the defendant to deliver vacant possession. It would be

most unfair and unjust to allow the defendant to complete the works eternally. In my view, on the peculiar facts of this case, the doctrine of waiver as applied in the case of *Hock Huat Iron Foundry* could not be applied in this case. I find the defendant in this case guilty of inordinate delay without giving any valid reason to complete the works on the said project after a notice of termination of almost 12 months had been issued. In this case if the defendant had delivered vacant possession of the said property before the plaintiff filed this action, I would not have decided in favour of the plaintiff.

In the light of the circumstances as I have discussed above, the answers to the questions posed by the plaintiff are as follows:

(1) under the circumstances of this case the plaintiff is entitled to terminate the said sale and purchase agreement;

(2) the defendant is obliged to refund all monies paid by the plaintiff to the defendant; and

(3) interest at the rate of 8%pa be paid by the defendant to the plaintiff from the date of notice of termination to the date of realization.

I also ordered that the costs of this action be paid by the defendant to the plaintiff.

Plaintiff's action allowed.

Reported by Lim Lee Na